

1959

*Present: Basnayake, C.J., and Sansoni, J.*

U. L. M. M. SAIDO HADJIAR, Appellant, and AMINA BEEBEE and others, Respondents.

*S. C. 661—D. C. Galle, 618/MB*

*Mortgage—Hypothecary action—Death of a person entitled to notice of the action—Appointment of representative—Procedure—Defect in mode of appointment of representative—Validity of hypothecary decree and execution sale—Mortgage Act, No. 6 of 1949, ss. 5, 26, 31 (2) (3).*

When a secondary mortgagee is dead, the non-issue of notice on his heirs in proceedings under the Mortgage Act does not render the mortgage decree invalid so as to vitiate the sale in execution.

In proceedings for the appointment of a representative of a deceased under the proviso to section 31 (2) of the Mortgage Act it is not necessary to hear the heirs of the deceased prior to making the appointment, even if they have been named as respondents to the application. In any event, if a person entitled to notice in a hypothecary action is dead, any defect in the proceedings for the appointment of a representative of the deceased person cannot affect the decree in the mortgage action or the execution sale of the mortgaged property, because it is not essential that the representative of the deceased should be a party to the mortgage proceedings.

**A**PPPEAL from a judgment of the District Court, Galle.

*H. V. Perera, Q.C., with M. T. M. Sivardeen, for Purchaser-Appellant.*

*D. S. Jayawickreme, Q.C., with M. Rafeek, for Petitioner-Respondent.*

*Cur. adv. vult.*

November 5, 1959. BASNAYAKE, C.J.—

The question that arises for decision on this appeal is whether the non-issue of notice on the heirs of a deceased secondary mortgagee who is entitled to notice in proceedings under the Mortgage Act, No. 6 of 1949, renders the mortgage decree invalid and vitiates the sale in execution.

Briefly the facts are as follows :—By mortgage bond No. 2445 of 7th December 1947 attested by Notary Mohamed Thahir of Galle, Mohamed Ally Mohamed Kiyadu of Galle mortgaged the land described therein as security for a sum of Rs. 3,500 borrowed by him from Naotunne Gamacharige Somawathie Rajapakse the mortgagee. On 20th December 1951 the mortgage bond was put in suit. Notice was issued on 21st February 1952 by the Court on Mohamed Ally Selha Beebee of No. 219 Colombo Road, Mahamodera, Galle, a secondary mortgagee whose address was registered. By his affidavit dated 5th May 1952 the Fiscal reported that she was not to be found at the address given and referred

to the Village Headman's report endorsed on 3rd May 1952 on the reverse of the notice. It stated that the person named therein was dead. The evidence does not show when she died. On 28th August 1952 the mortgagee's Proctors moved to have a representative appointed. The mortgagee named as respondents to her petition H. M. Mohamed Alavudeen the husband of Selha Beebee, her minor daughter, her three brothers and her sister. On 11th September 1952 the Court made order appointing her husband Alavudeen as "legal representative" (*sic*) of the estate of the deceased and ordered notice on him. It was not till 9th October 1952 that summons was reported served on the defendant. On 23rd April 1953 it was reported that notice could not be served on Alavudeen as he was "not found and has gone abroad" and the mortgagee's Proctors moved on 14th May 1953 that Alavudeen's appointment be cancelled and that Selha Beebee's brother Mohamed Ally Mohamed Thahir be appointed as representative. On 6th August 1953 the Court cancelled Alavudeen's appointment and appointed Thahir as representative. Thereafter on 11th February 1954 decree was entered after service of notice of the action on Thahir. On 26th June 1956 the mortgaged property was sold by public auction and the appellant purchased it for Rs. 4,580. The sale was confirmed on 30th July 1956 and the conveyance No. 3378 was executed by the auctioneer on 23rd August 1956. On 22nd September 1956 Mohamed Ally Mohamed Javath, a brother of the deceased Selha Beebee, who was named as the third respondent to the application to appoint a representative of the deceased, filed an application by way of summary procedure praying that the order of the Court dated 30th July 1953 appointing a representative to the estate of Selha Beebee as well as the mortgage decree be vacated and that the sale be set aside. On 12th February 1957 order nisi was entered and notice was issued returnable on 3rd April 1957. On that day the respondents to the application were absent and a date was fixed for objections. On 22nd May 1957 objections were filed. After hearing counsel the learned District Judge made the following order :—

"On the submissions made, I am convinced that the order nisi made on the 4th October 1956 cannot stand. I dismiss the order nisi with costs."

Thereafter the learned District Judge proceeded to hear another petition which had been filed on 11th February 1957 by the sister of Selha Beebee, Mohamed Ally Amina Beebee, the respondent to this appeal. She had named as respondents to it the mortgagor, the mortgagee, the purchaser, and Thahir as representative of Selha Beebee. In this petition the petitioner prayed that—

- (a) the proceedings of 30th July 1953 and the order of Court dated 6th August 1953 purporting to appoint Thahir as "legal representative" of Selha Beebee be vacated ;
- (b) the mortgage decree entered in the case be vacated ;
- (c) the Sale of 26th June 1956 be set aside.

The sole ground on which the petitioner challenged the decree and sale was that in the proceedings for the appointment of Thahir as representative of the deceased the respondents named in the petition were not noticed and that Selha Beebee's heirs were not heard before Thahir was appointed.

Having stated the relevant facts I shall now proceed to examine the Mortgage Act, No. 6 of 1949. The mortgage in question being one created before 16th January 1950, the appointed date, the relevant sections are 26 and 31 subsections (2) and (3). They read—

“ 26 (1) Where any mortgagor dies before the institution of a hypothecary action in respect of the mortgaged land, or any mortgagor or any person who is or becomes a party to a hypothecary action dies after the institution of the action, and grant of probate of the will or issue of letters of administration to the estate of the deceased has not been made, the Court in which the action is to be or has been instituted may in its discretion, after the service of notice on such persons, if any, and after such inquiry as the Court may consider necessary, make order appointing a person to represent the estate of the deceased for the purpose of the hypothecary action, and such person may be made or added as a party to the action :

“ Provided, however, that such order may be made only if—

- (a) the value of the mortgaged property does not exceed two thousand five hundred rupees ; or
- (b) a period of six months has elapsed after the date of the death of the deceased ; or
- (c) the Court is satisfied that delay in the institution of the action would render the action not maintainable by reason of the provisions of the Prescription Ordinance.

“ (2) In making any appointment under sub-section (1) the Court shall appoint as representative a person who after summary inquiry appears to the Court to be the person to whom probate of the will or letters of administration to the estate of the deceased would ordinarily be issued :

“ Provided, however, that in the event of a dispute between persons claiming to be entitled to be so appointed, the Court shall make such an appointment (whether of one of those persons or of any other person) as would in the opinion of the Court be in the interests of the estate of the deceased.”

“ 31 (2) Where a hypothecary action is instituted for the enforcement of a mortgage created before the appointed date, and the Court is satisfied that any person entitled to notice of the action is or was dead or an insolvent, minor or lunatic before or at the time of the issue to him of notice of the action, the person to whom probate

of the will or letters of administration to the estate of the deceased is granted, or, as the case may be, the duly appointed assignee or curator or manager shall be added as a party to the action upon application made to the Court in that behalf whether by such person or by any party to the action :

“ Provided, however, that it shall be lawful for the Court in the circumstances and subject to the conditions set out in section 26 to appoint a representative of the deceased for the purpose of the hypothecary action, and in any such case the representative so appointed may be added as a party to the action in lieu of the executor or administrator.

“(3) Where the executor or administrator or the duly appointed representative of a deceased person, or, as the case may be, the assignee, curator, or manager of the estate of the insolvent, minor, or lunatic is not added as a party under sub-section (2), the executor or administrator or, as the case may be, the assignee, curator or manager shall—

(a) be entitled upon making a claim in that behalf under section 57 to participate in the proceeds of sale remaining after satisfaction of the amount decreed to be due upon the mortgage in suit in the action ; or

(b) if he does not so participate, be deemed to be a party omitted for the purpose of enabling an action to be brought by or against him under section 19 and if such an action is brought the provisions of sections 20 to 23 shall apply accordingly.”

The effect of the above sections is that when a person entitled to notice of the mortgage action dies, whether the death be before or after the issue of notice on such deceased, the person to whom probate of the will or letters of administration to the estate of the deceased is granted or any party to the action has the right to apply to the Court that the executor or administrator as the case may be be added as a party to the action. Upon the applicant satisfying the Court that the person entitled to notice is dead the Court is bound to add such person as a party. Where there is no person to whom probate or letters of administration has been granted the Court is empowered by the proviso to section 31 (2) to appoint a representative of the deceased for the purpose of the mortgage action. The Court has power to add such person as a party to the action if application is made in that behalf.

Subsection (3) makes it clear that a mortgage action may proceed without the executor or administrator or representative of a deceased person entitled to notice being added as a party. In such a case the rights of the executor, administrator or representative as the case may be are as stated in paragraphs (a) and (b) of the subsection.

In the instant case Selha Beebee was made a party as a “person entitled to notice” within the ambit of that expression as defined in section 5. Alavudeen’s appointment was a good appointment and satisfied the requirements of the Ordinance. For the purpose of this appeal it is not

necessary to decide whether the Court had power to cancel his appointment, because the cancellation was never seriously challenged. It is Thahir's appointment that was attacked. As Alavudeen was reported to be abroad the Court proceeded to appoint Thahir as representative of the deceased. Notice was issued on him and served and the trial proceeded. The proceedings thereafter are not open to objection. In proceedings for the appointment of a representative of a deceased under the proviso to section 31 (2) it is not necessary to hear all the heirs of the deceased prior to making the appointment even if they are named as respondents to the application as was done in the instant case. The learned Judge is wrong in holding that it is imperative that notice should be served on the heirs of the deceased in order that they may be heard. In any event any defect in the proceedings for the appointment of a representative of a deceased person entitled to notice cannot affect the decree in a mortgage action or the sale of the mortgaged property because it is not essential that the representative of a person entitled to notice should be a party to the mortgage proceedings.

I therefore set aside the order of the learned District Judge and make order dismissing the application of the petitioner with costs. The appellant is entitled to the costs of appeal.

SANSONI, J.—I agree.

*Appeal allowed.*

